Supreme Court, U. S.
FILED
NOV 10 1980
MICHAEL RODAK, JR., CLERK

No. 79-6624

In the Supreme Court of the United States

OCTOBER TERM, 1980

HUMBERTO ROSALES-LOPEZ, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 20, 1980.
CERTIORARI GRANTED OCTOBER 6, 1980.

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[1] "C.R. DOC:" refers to the document number assigned by the district court clerk in the Clerk's Record or official papers of the district court.

[2] "R.T." refers to the Reporter's Transcript of the trial proceedings.

DOCKET ENTRIES

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

U.S. v. ROSALES-LOPEZ, HUMBERTO

Criminal No. 78-00863-01

* * * * *

Date	*Proceedings*
1978	
12/12	Fld cmplt (McCue) Deft arr; Ent ord P/E set 12/21/78 at 10:00 am, Bond set at $10,000 C/S; M/Ws:atty apptd: Mark Zickel CJA; Bond set at $1,000 C/S; B/R date set 12/21/78 at 10:00 am. (INFANTE)
	* * *
1979	
2-26-79	Ent ord—Cont to 2-27-79 at 9am for J/T. (CORCORAN) Fld deft's requested voir dire t/w proof of serv Fld deft's mot in limine to obtain ord to preserve a fair trial t/w proof of serv
2-27-79	JURY TRIAL—1st DAY—Jurors impaneled and sworn; swore wits; fld exhibits. BEFORE TRIAL—Mot to dismiss for individeious (sic) prosecution mot to dismiss indict—denied; mot to suppress evidence and

DOCKET ENTRIES

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

HUMBERTO ROSALES-LOPEZ, DEFENDANT-APPELLANT.

No. 79-1302

Date	*Filings-Proceedings*
	* * *
1980	
MAR 21	AS OF 3/20/80, FILED OPINION—AFFIRMED.
MAR 21	AS OF 3/20/80, FILED & ENTERED JUDGMENT.
	* * *
MAY 14	Filed, as of 5/12/80, order (WL, A & Palmieri) The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.
20 MAY 1980	MANDATE ISSUED
	* * *
	statements denied; mots in limine re prior testimony of deft—granted. mot to suppress prior statements and omit from govt's opening statement denied. Entord—Cont'd for furth J/T to 2-28-79 at 9am.
2-28-79	JURY TRIAL—2nd DAY—Swore wits, fld exhibits; Entord—Fld defts requested jury instructions; defts mot for mistrial denied; defts mot for J/A denied. Contd for furth J/T to 3-1-79 at 9am.
	* * *

3-1-79 Entord—Mot for judgment of acquittal denied. 11:55 jury retires; 3:50pm jury returns; Verdict: GUILTY all cts, polled; Ref to P/O for I/R and cont to 4-2-79 at 8:30am before Judge THOMPSON for sent. Fld crts given instructions.

* * *

4-2-79 Entord—Judgment: Ct 1: Commtd cust AG impr 18 mos; On ea ct 2–7; Commtd AG impr 5yrs ea ct consec; Exec sent as to cts 2–7 susp & prob for 5 yrs superv waived. On mot USAtty dismiss underlying indict. Fld judgment, issed cys ENT 4-3-79 JS-3

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

November 1978—Grand Jury

Criminal Case No. 780863-1, 2-6-

(Superseding)

INDICTMENT—Filed Feb. 9, 1979

Title 18, U.S.C., Sec. 371; Title 8, U.S.C., Sec. 1324—Conspiracy to Conceal, Harbor, and Shield Aliens, and Illegal Transportation of Aliens; Title 8, U.S.C., Sec. 1324(a)(3)—Concealing, Harboring, and Shielding Aliens; Title 8, U.S.C., Sec. 1324(a)(2)—Illegal Transportation of Aliens; Title 18, U.S.C., Sec. 2—Aiding and Abetting

UNITED STATES OF AMERICA, PLAINTIFF,

v.

HUMBERTO ROSALES-LOPEZ, JOE MANUEL FLORES, DEFENDANTS.

The Grand Jury charges:

COUNT ONE

Beginning at a date unknown to the Grand Jury and continuing up to and including December 11, 1978, within the Southern and Central Districts of California and other places unknown, defendants HUMBERTO ROSALES-LOPEZ and JOE MANUEL FLORES, and others known and unknown to the Grand Jury, unlawfully, wilfully, and knowingly did combine, conspire, and agree together and with each other and with David Falcon-Zavala and Virginia Hendricks Bowling,

both of whom not here charged, to violate certain laws of the United States, to wit: to violate Title 8, United States Code, Section 1324.

It was a part of said conspiracy that the defendants and others would wilfully and knowingly conceal, harbor, and shield, and attempt to conceal, harbor, and shield from detection, aliens not lawfully entitled to enter or reside in the United States.

It was further a part of the said conspiracy that the defendants and others would transport and move, and attempt to transport and move, aliens within the United States by means of transportation and otherwise, knowing them to be in the United States in violation of law, and in furtherance of such violation of law, and knowing or having reasonable grounds to believe that their last entry into the United States occurred less than three years prior thereto; all in violation of Title 18, United States Code, Section 371.

OVERT ACTS

In pursuance of the said conspiracy, and to further the objects thereof, the following overt acts, among others, were committed within the Southern District of California:

1. On or about December 11, 1978, defendant HUMBERTO ROSALES-LOPEZ drove a vehicle in the Southern District of California.
2. On or about December 11, 1978, defendant JOE MANUEL FLORES drove a vehicle in the Central District of California.
3. On or about December 11, 1978, previously-indicted coconspirator, David Falcon-Zavala, drove a vehicle in the Central District of California.

4. On or about December 11, 1978, previously-indicted coconspirator, Virginia Hendricks Bowling, drove a vehicle in the Southern District of California.

COUNT TWO

On or about December 11, 1978, within the Southern District of California, Virginia Hendricks Bowling, not here charged, knowing that an alien, namely, Dimas Valdez-Caldera, was then in the United States in violation of law and, having reasonable grounds to believe that said alien's entry into the United States occurred less than three years prior to the aforesaid date, did transport and move, and attempt to transport and move, said alien within the United States, in furtherance of such violation of law; in violation of Title 8, United States Code, Section 1324(a)(2); and defendant HUMBERTO ROSALES-LOPEZ aided, abetted, counseled, induced and procured the commission of the aforesaid offense; in violation of Title 18, United States Code, Section 2.

COUNT THREE

On or about December 11, 1978, within the Southern District of California, Virginia Hendricks Bowling, not here charged, knowing that an alien, namely, Victor Rodriguez-Valdez, was then in the United States in violation of law and, having reasonable grounds to believe that said alien's entry into the United States occurred less than three years prior to the aforesaid date, did transport and move, and attempt to transport and move, said alien within the United States, in furtherance of such violation of law; in violation of Title 8, United States Code, Section 1324(a)(2); and defendant HUMBERTO ROSALES-LOPEZ aided, abetted, counseled, induced and procured the commission of the aforesaid offense; in violation of Title 18, United States Code, Section 2.

COUNT FOUR

On or about December 11, 1978, within the Southern District of California, Virginia Hendricks Bowling, not here charged, knowing that an alien, namely, Armando Valdez-Quintanor, was then in the United States in violation of law and, having reasonable grounds to believe that said alien's entry into the United States occurred less than three years prior to the aforesaid date, did transport and move, and attempt to transport and move, said alien within the United States, in furtherance of such violation of law; in violation of Title 8, United States Code, Section 1324(a)(2); and defendant HUMBERTO ROSALES-LOPEZ aided, abetted, counseled, induced and procured the commission of the aforesaid offense; in violation of Title 18, United States Code, Section 2.

COUNT FIVE

On or about December 11, 1978, within the Southern District of California, Virginia Hendricks Bowling, not here charged, and defendant HUMBERTO ROSALES-LOPEZ did wilfully and knowingly conceal, harbor and shield, and attempt to conceal, harbor and shield from detection an alien, namely, Dimas Valdez-Caldera, which alien was not duly admitted by an immigration officer and was not lawfully entitled to enter or reside within the United States, as said defendant then and there well knew; in violation of Title 8, United States Code, Section 1324(a)(3).

COUNT SIX

On or about December 11, 1978, within the Southern District of California, Virginia Hendricks Bowling, not here charged, and defendant HUMBERTO ROSALES-LOPEZ did wilfully and knowingly conceal, harbor and shield, and attempt to conceal, harbor and shield from detection an alien, namely, Victor Rodriguez-Valdez, which alien was not duly admitted by an immigration officer and was not lawfully entitled to enter or reside within the

United States, as said defendant then and there well knew; in violation of Title 8, United States Code, Section 1324(a)(3).

COUNT SEVEN

On or about December 11, 1978, within the Southern District of California, Virginia Hendricks Bowling, not here charged, and defendant HUMBERTO ROSALES-LOPEZ did wilfully and knowingly conceal, harbor and shield, and attempt to conceal, harbor and shield from detection an alien, namely, Armando Valdez-Quintanor, which alien was not duly admitted by an immigration officer and was not lawfully entitled to enter or reside within the United States, as said defendant then and there well knew; in violation of Title 8, United States Code, Section 1324(a)(3).

DATED: February 9, 1979.

A TRUE BILL:

/s/ _____
Foreman

/s/ _____
MICHAEL H. WALSH
United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

(HON. HOWARD F. CORCORAN)

Criminal No. 78-863-1

REQUESTED VOIR DIRE—Filed Feb. 26, 1979

UNITED STATES OF AMERICA, PLAINTIFF,

v.

HUMBERTO ROSALES-LOPEZ, DEFENDANT.

Request for Voir Dire

Pursuant to Rule 24(a), Federal Rules of Criminal Procedure, to provide effective assistance of counsel and to exercise the defendant's right to a trial by an impartial jury, defense counsel expressly requests the opportunity to personally voir dire the prospective members of the jury. Defense counsel expressly agrees to limit his questioning to no more than 30 minutes to make a reasonable inquiry of the background of the prospective members of the jury in order to intelligently exercise his challenges for cause and peremptory challenges. The judge can never adequately probe from the perspective of the defendant. The defense does not object to the Court's general inquiry, but does ask for this opportunity to determine if the jurors are truly sensitive yet unbiased to the issues and persons in this case.

Alternative Request for Questions to be Put to Prospective Jurors

If such request is denied, the defense then requests that the questions listed below are put to each prospective juror to ensure impartiality in the trial of this case and to allow the intelligent and informed exercise of peremptory challenges.

1. Do you or do members of your family or friends know the Honorable Howard F. Corcoran who is the presiding judge in this case? Do any of you know counsel for the prosecution, Irene Takahashi, or counsel for the defense, John J. Cleary, Federal Defenders?

2. Do you or do members of your family know any of the defendants in this case: Humberto Rosales-Lopez, Joe Manuel Flores, David Falcon-Zavala, Jose Humberto Zamora-Moreno, or Virginia Hendricks Bowling?

3. Do you or do any members of your family know any of the following federal agents who may be witnesses in this case: Richard G. Sanders, Robert Page, and Sheldon Grover of the Immigration and Naturalization Service?

4. Do you have any friends or relatives who are connected with any local, state or federal (including military) law enforcement agency or with a prosecutor's office? If you have such friends or relatives connected with law enforcement, have you ever discussed with them guilt or innocence of people charged with violating the law?

5. What are your feelings about the illegal alien problem?

6. Have you ever employed or have friends that have employed illegal aliens?

7. Would you consider the race or Mexican descent of Humberto Rosales-Lopez in your evaluation of this case? How would it affect you?

8. How long have you resided in San Diego County and where do you live?

9. Do you have any difficulty in hearing or seeing, which would include reading?

10. Where do you reside?

11. Where do you work, and what are the nature of your duties? What are the occupation or activities of your spouse? Children?

12. If retired, what was your previous occupation and how long have you been retired?

13. Have you ever worked for the federal government? If so, as what? How long?

14. How many years of formal education have you had?

15. Have you heard or do you have any knowledge about this case that you learned prior to entering this courtroom today? If so, please relate what you heard and from where or whom you heard it?

16. Have you ever been the victim of a crime?

17. Have you, members of your family, or close personal friends ever testified in a criminal trial or before a grand jury? If so, please relate the circumstances.

18. Have you ever sat as a juror in a civil or criminal case? What was the nature of the case and the verdict?

19. Do you know or have you come to know any other prospective juror better than the other jurors in the courtroom this morning?

20. Have you ever discussed your verdict after a trial with the prosecution or defense counsel, witnesses, or parties in the case? If so, what were the circumstances?

21. Do you have any problem accepting the presumption of innocence of the defendant or that the Government must prove the defendant guilty beyond a reasonable doubt?

22. Would the fact that a co-defendant was fugitive influence your evaluation of the case against Humberto Rosales-Lopez?

23. Are you able to speak Spanish? If so, how well? Would you be willing to accept the interpreter's translation?

24. Would you hold it against the defendant who did not testify?

25. Would you feel an obligation to reach a verdict because that was the vote of the majority?

26. If you were on trial, what questions would you put to yourself concerning your ability to be impartial as a juror?

Respectfully submitted,

/s/ _____

JOHN J. CLEARY
Federal Defenders of San Diego, Inc.
Attorneys for Defendant Rosales

Dated: 26 FEBRUARY 1979

[131] *SAN DIEGO, CALIFORNIA, TUESDAY, FEBRUARY 27, 1979, 9:15 A.M.*

(Prior unrelated proceedings.)

* * * * *

(The following proceedings had in open court between court and counsel out of the presence and hearing of the jury:)

MR. CLEARY: Before we call the jury, could I have some of the motions taken care of?

THE COURT: Very well. What motions are open? Anything that has been ruled upon by Judge Thompson—

MR. CLEARY: I don't want to needlessly belabor the Court with that. I am just trying to make sure in the unfortunate event that there is a conviction that my record is clear.

I have tendered to the clerk an original and a copy of the proposed jury instructions, and I would now tender a copy to counsel for the Government. I believe the Court has already received my motion in limine.

* * * * *

[140] THE COURT: Anything further?

MS. TAKAHASHI: Your Honor, are you going to be hearing the matters raised by defense counsel relative to his requested voir dire questions? He has asked the court if he could personally voir dire the jurors.

THE COURT: I will voir dire the jury, and after I voir dire the jury, then I will consider any further requests.

MR. CLEARY: Your Honor, could I have one other comment in the light of action of the Court denying my voir dire? I just covered it in the motion in limine, but I wanted you to be present at the time, that since we would have no contact and no effort to even discuss with a prospective jury member their attitudes, their understanding of the law, or anything of that nature, the Court has exercised its discretion, I am not doubting it, but I feel that some type of preliminary instructions are almost mandated. At least there is footnote references in this Circuit that that is the encouraged practice. I think in this case

that it is essential in light of the fact I have been foreclosed from voir dire.

[141] THE COURT: I think we can handle the instruction at the appropriate time, and I see no necessity in a simple case like this for lengthy preliminary instructions, so I will voir dire the jury. Then we will have a side bar conference as to whether you have any further questions, and you can take exception to the denial.

Is there anything further?

MR. CLEARY: We are ready for the defense, your Honor.

MS. TAKAHASHI: Ready for the Government.

THE COURT: Bring the jury.

THE CLERK: Very well, your Honor. Your Honor, we do have an interpreter present. Do you wish me to swear the interpreter?

THE COURT: Yes.

THE CLERK: Would the interpreter please rise?

(Interpreter duly sworn to translate from the Spanish language to the English language and vice versa.)

(The following proceedings had in open court in the presence of the jury:)

(Jury panel sworn.)

THE COURT: Good morning, ladies and gentlemen. From among your number we are going to impanel a so-called [142] Petit jury to try criminal charges against the defendant who is Humberto Rosales-Lopez.

In order to assure that he has a fair and impartial jury to try the charges against him—can you all hear me? Let me see if I can turn the volume up.

Let me repeat. You can hear me now, I'm sure. In order that this defendant shall have a fair and impartial jury to try the charges against him, it is necessary that we address certain questions to the panel to make sure that there are no underlying prejudices, there are no underlying reasons why you can't sit as a fair and impartial juror if chosen to do so in this case.

Now, in order to have a background for these questions, let me first tell you the nature of this charge against this defendant. He is charged with a conspiracy to harbor and transport aliens here illegally in the United States. He is also charged with the substantive violations of harboring and transporting aliens who are illegally in the United States.

Now, at the outset, let me ask Mr. Humberto Rosales-Lopez to rise and face the jury panel.

(Defendant complies.)

THE COURT: Does anyone know the defendant?

(All jurors answered in the negative.)

THE COURT: Thank you, sir. You may sit down.

(Defendant complies.)

[143] THE COURT: The defendant is represented by Mr. John Cleary of the Federal Defenders Service. Does anyone know Mr. Cleary?

(All jurors answered in the negative.)

THE COURT: The case will be prosecuted on behalf of the Government by Miss Irene Takahashi. Does anybody know Miss Takahashi?

(All jurors answered in the negative.)

THE COURT: Would you introduce the agent at your table, Miss Takahashi?

MS. TAKAHASHI: Yes, Agent Sanders from Immigration Service.

THE COURT: Does anyone know Agent Sanders?

(All jurors answered in the negative.)

THE COURT: Now with that introduction of the people involved and a brief description of the charges, has anyone acquired any knowledge whatsoever of this case by way of newspaper reports or radio reports or television or by any means whatsoever, do any of you have any knowledge whatever concerning this case of this defendant?

(All jurors answered in the negative.)

THE COURT: Certain people who are not on trial in

this case but whose names will be mentioned here as co-conspirators or otherwise are Joe Manuel Flores. Does that name ring a bell with anyone on the panel?

[144] (All jurors answered in the negative.)

THE COURT: David Falcon-Zavala—does that name mean anything to anyone?

(All jurors answered in the negative.)

THE COURT: Jose Humberto Zamora-Moreno—does that mean anything to anyone?

(All jurors answered in the negative.)

THE COURT: Virginia Hendricks Bowling—does anyone know anything about Miss or Mrs. Bowling?

(All jurors answered in the negative.)

THE COURT: The Government may, I don't say that they will, but the Government may call the following persons as witnesses: Richard G. Sanders who is present at the table. You have already had an opportunity to observe him. Mr. Robert Page and Mr. Sheldon Grover of the Immigration and Naturalization Service. Are any of you acquainted in any way or know anything about those persons?

(All jurors answered in the negative.)

THE COURT: Are any of you or any of your close friends or relatives presently employed by any law enforcement agency, national, federal, county or otherwise? Rise and identify yourself.

JUROR ASHER: Roy Asher. I have a son in the San Diego Police Department.

THE COURT: Do you ever discuss his work with him?

[145] JUROR ASHER: No, sir.

THE COURT: Would the fact that your son is a member of a local law enforcement agency incline you to give more credence to the testimony of a law enforcement agent than to other persons?

JUROR ASHER: No, sir.

THE COURT: Anybody else have any?

JUROR RAMSEY: My husband is a juvenile probation officer.

THE COURT: Identify yourself.

JUROR RAMSEY: Julie Ramsey.

THE COURT: Federal probation officer?

JUROR RAMSEY: County.

THE COURT: Would that in any way affect your acceptance of testimony of one kind of another?

JUROR RAMSEY: No, sir.

THE COURT: Do you think you could sit as a fair and impartial juror?

JUROR RAMSEY: I can.

THE COURT: Anyone else? Yes, identify yourself.

JUROR REESE: Robert Reese. I have a brother-in-law who is a PR man with the San Diego Police Department.

THE COURT: Would that affect your judgment in accepting testimony from one person or another?

JUROR REESE: Not at all; no, sir.

[146] THE COURT: Now, this case, as I have already announced, involves aliens alleged to be illegally in the United States. Do any of you have any feelings about the alien problem at all? Is there anything about it that would cause you to—yes, ma'am?

JUROR ROSA: My name is Palos De La Rosa. It is just a name that they use for the people to transport illegal aliens and place them intentionally—

THE COURT: Very well. You may be excused. Would you return to the jury lounge, please.

Identify yourself.

JUROR HAMPTON: Sam Hampton. The defendant looks very familiar to me, and that is about all. You asked the question awhile ago, but he looks very familiar to me.

THE COURT: Would you take a good look at him and tell us whether or not you do know him?

JUROR HAMPTON: He looks very familiar. I really wouldn't say.

THE COURT: Would the fact in any way, if it is a fact, interfer with your verdict as a fair and impartial juror?

JUROR HAMPTON: It might be.

THE COURT: It might be.

Let me again ask the general question: Do any of you have any particular feelings one way or the other about [147] about aliens or could you sit as a fair and impartial juror if you are called upon to do so?

In the back row?

JUROR SKELLY: Kristine Skelly, and I have mixed feelings about it. I don't think I could be impartial. I have a tendency to feel—my own feelings, I don't think I could be a fair juror.

THE COURT: Very well, you will be excused. Would you return to the jury lounge, please?

Do any of you have trouble hearing? Do any of you have poor eye sight where you wouldn't be able to read documents if documents were introduced into evidence?

(All jurors answered in the negative.)

THE COURT: Do any of you have physical impairment that would prevent you from continuing with this case for a day or two?

JUROR SCHEUFLER: Bill Scheufler and I have a doctor's appointment at 1:15 tomorrow.

THE COURT: You have a doctor's appointment when?

JUROR SCHEUFLER: 1:15 tomorrow afternoon.

THE COURT: Is it urgent?

JUROR SCHEUFLER: It would be important that I would be there, yes.

THE COURT: All right. You will be excused.

Has any member of the prospective panel had a [148] legal education? Identify yourself.

JUROR WATERFORD: Robert Waterford. I am a retired lawyer.

THE COURT: Did you practice criminal law?

JUROR WATERFORD: I was assistant corporate attorney for the City of Chicago prosecuting building violations of the building code.

THE COURT: Would you be able to accept the instructions of the court as to the law that's applicable to this case notwithstanding any previous experience you had in the field of law?

JUROR WATERFORD: Yes, your Honor, I would.

THE COURT: Thank you. Anyone else have a legal education of any kind? Have you worked in a law office, for example, and brushed against the law?

JUROR SULLINS: Yes, sir.

THE COURT: Identify yourself.

JUROR SULLINS: Harold Sullins. I spent three years as court liaison between the military and the South Bay courts of Chula Vista, El Cajon, and National City.

THE COURT: In view of that experience, would you be able to accept the instructions of the court?

JUROR SULLINS: Yes, sir.

THE COURT: And not try to associate your previous experience in any way?

[149] JUROR SULLINS: Yes, I believe I could.

THE COURT: Thank you.

Do any of you have any quarrel with a precept of our system of criminal jurisprudence to the effect that a defendant is presumed to be innocent and that that presumption attaches throughout the whole trial. Do any of you have any quarrel with that concept?

(All jurors answered in the negative.)

THE COURT: I think we will stop the general questioning there. Would you fill the jury box, Mr. Clerk?

THE CLERK: Very well, your Honor. Ladies and gentlemen, as I call your name, would you please take a seat in the jury box.

Do you wish me to call for one alternate, your Honor?

THE COURT: Yes.

THE CLERK: Very well, your Honor.

Juror No. 26, Marcia Lemmon;
No. 15, Raymond Green;
No. 44, Oren Thomas;
No. 22, Loraine Howell;
No. 35, Vicky Peynado;
No. 12, Dennis Frye;
No. 47, Robert Waterford;
No. 14, Geneva Glenn;
[150] No. 11, Doniphan Frazee;
No. 9, Barbara Donnelly;
No. 20, Naomi Henion;
No. 10, Denis Doran;
No. 42, Dorothy Stark;
No. 2, Roy Asher;
No. 1, Isamu Akamatsu;
No. 43, Harold Sullins;
No. 17, Marcella Harder;
No. 37, Robert Reese;
No. 18, Eileen Kennedy;
No. 4, Diane Canterbury;
No. 33, John O'Leary;
No. 31, Bette Nichols;
No. 5, Sondra Cover;
No. 48, John Workman;
No. 8, Harve Dolen;
No. 28, Katherine May;
No. 24, John Kleeb;
No. 45, Kenneth Veatch;
No. 30, Kathern Muller;
No. 38, Gladys Ritchie;
No. 46, Kathleen Waller.

THE COURT: In a moment I am going to ask questions of the first 31 names called. Let me address one or two [151] questions to the panel as a whole.

I am informed that this case will take two days. Is it going to seriously inconvenience anyone on the panel if it goes two days or even into three days?

JUROR Green: Ricky Green. I am taking a trip tomorrow to San Francisco and New York City, a business trip.

THE COURT: There is no way you can postpone it?

JUROR GREEN: No, sir.

THE COURT: Very well. You will be excused, and would the gentleman sitting in the corner take his place?

THE CLERK: Just a minute, sir. I will have to call one more name to put him in the box.

Juror No. 39, Lana Sallaz.

THE COURT: Then just one further general question addressed to the whole venire, the whole panel.

Does any reason occur to anyone of you why you could not sit in this case as a fair and impartial juror, any reason whatsoever? I assume that the answer is no.

Very well then. Let me now address the individual jurors beginning with you, ma'am, as number one. Would you rise? Then we will take them in order.

Would you give us your name; your occupation; your husband's occupation if any; if you are retired, what your previous occupation was; and how long you have been a resident of San Diego.

[152] JUROR LEMMON: My name is Marcia Lemmon. I work in sales in a dress shop; I'm a widow; my husband was an industrial roofing consultant; and I have been in San Diego since 1964.

THE COURT: Thank you. Next?

JUROR SALLAZ: My name is Lana Sallaz; I am employed by the Naval Oceans Systems as a computer technician; I have been in San Diego six years; I am single.

JUROR THOMAS: Oren E. Thomas; I have been in California 54 years in October, your Honor; United States Navy Chief Petty Officer, Chief Boilermaker, retired; and with the United States Civil Service 23 years.

THE COURT: Thank you.

JUROR HOWELL: Loraine Howell; I have been in San Diego since 1967; my husband is retired; he was a hydraulic engineer in New York State.

JUROR PEYNADO: My name is Vicky Peynado; and I am a supervisor at the Naval Supply Center; my husband works for Maynard's Electroplater and we have been here since 1967.

JUROR FRYE: My name is Dennis Frye; resided in San Diego about three years; work in data processing; my wife is a homemaker.

JUROR WATERFORD: My name is Robert Waterford; I stated previously that I am a retired lawyer; I've lived in San Diego for the past six years; married; my wife is not employed.

[153] JUROR GLENN: My name is Geneva Glenn; I have lived in Chula Vista 15 years; I am employed in San Diego at Mercy Hospital; my husband was in the Marine Corps.

JUROR FRAZEE: My name is Doniphan Frazee; I have lived in San Diego 30 years; I'm a PBX installer with Pacific Telephone; my wife is a homemaker.

JUROR DONNELLY: My name is Barbara Donnelly; I was born in San Diego; I am a materiel expediter for Southwest Marine; and I was formerly married to a school teacher and now divorced.

JUROR HENION: My name is Naomi Henion, and I'm retired from Civil Service from the Air Force; I was with the Inspector General's office; and I have been—I am a widow. My husband was killed in World War II; and I have lived here in San Diego four years.

JUROR DORAN: My name is Denis Doran; I have lived in San Diego County for about 25 years; my wife is a licensed vocational nurse, not working at this time; I am a PBX installer with Pacific Telephone.

JUROR STARK: My name is Dorothy Stark; I have lived in San Diego 36 years; I am a retired medical technician; and I'm a widow.

JUROR ASHER: I'm Roy Asher; retired from the Navy; lived in this area, Chula Vista, since 1963, 16 years; I am married; my wife is a housewife.

[154] JUROR AKAMATSU: My name is Isamu Akamatsu; my wife and I have lived in San Diego seven years; I am a senior systems analyst for a data processing machine manufacturer; my wife works for Mesa College.

JUROR SULLINS: Harold Sullins; I am retired Navy; also retired Civil Service; my wife is retired also; I have maintained a home in San Diego since 1947.

JUROR HARDER: Marcella Harder; we moved here from Omaha, Nebraska, to San Marcos three years ago; my husband is retired from the Burlington Railroad; I am retired from Western Electric.

JUROR REESE: Robert Reese, a native son, transport driver for Arrowhead Water; my wife's a homemaker.

JUROR KENNEDY: Eileen Kennedy; we have lived in San Diego since 1962; I am a pharmacist at the Naval Supply; my husband is a salesman.

JUROR CANTERBURY: My name is Diane Canterbury; I have lived in San Diego about eight and half years; I am a homemaker; my husband and I are owners and operators of two McDonald's Restaurants in San Diego.

JUROR O'LEARY: My name is John O'Leary; I am retired from the Air Force; I have lived in San Diego since 1937; 20 years in the service; I am presently employed as a computer specialist for the Navy; my wife is a homemaker.

JUROR NICHOLS: My name is Betty Nichols; I am employed by [155] Physician's Supply Company, I am a buyer for the uniform stores; my husband is a machinist at North Island; we have lived in San Diego 31 years.

JUROR COVER: Sondra Cover; I am a homemaker; my husband is a self-employed architect in San Diego; we have lived here seven years.

JUROR WORKMAN: John Workman; I work for Food Basket; single; lived in San Diego 23 years.

JUROR DOLEN: My name is Howard Dolen; I have lived in Carlsbad for the last 20 years; I'm retired, two and a half years ago; before that I was maintenance in apartments; prior to that I was a dispatcher for the Yellow Cab Company, Oceanside.

JUROR MAY: Katherine May, widow, housewife; I have lived in San Diego six years.

JUROR KLEEB: John Kleeb; I am a construction project manager; my wife is a teacher's assistant; and I have lived in Cardiff five years and San Diego two years, seven years in California total.

JUROR VEATCH: My name is Kenneth Veatch; production foreman at Naval Steamship Building; I've lived in the San Diego area 21 years; recently divorced.

JUROR MULLER: Katherine Muller; I have lived in the San Diego area 46 years; I am an ex-library technician.

JUROR RITCHIE: My name is Gladys Ritchie; I work for [156] American Airlines; I have lived in San Diego since 1960; my husband works at North Island, Civil Service.

JUROR WALLER: My name is Katherine Waller; I am employed by Grayline Tours, customer service; I have lived in San Diego six years.

THE COURT: May I ask counsel to approach the bench?

(The following proceedings had at sidebar out of the hearing of the jury.)

THE COURT: Anything further?

MR. CLEARY: Yes, your Honor, I have, of course, submitted to the Court my extensive list of requested questions, and I know I haven't been given the opportunity of voir dire, and I feel to at least preserve my concept of the impartial jury and explore the background on challenges and peremptory challenges, the following questions would be given, and I would like the opportunity to state the reasons why the particular questions should be asked: The Court has not asked whether or not anyone has employed aliens or illegal aliens, and I think the Court has heard—

THE COURT: I think they have a constitutional right.

MR. CLEARY: They shouldn't serve on the jury, then.

THE COURT: That is something else.

MR. CLEARY: I feel we have a restaurant owner—that makes it a fair question.

THE COURT: Motion denied.

[157] MR. CLEARY: The next question as to Mexican descent or race of my client, I think it is Aldredge, 1898, and notwithstanding the Supreme Court decision as to state cases, clearly in a federal case, the Court must explore all racial antagonism against my client because he happens to be of Mexican descent.

Further, I am at a substantial disadvantage in trying to exercise my challenges for cause, or peremptory challenges, unless I have the manifest as to federal employment and also the question taken out is whether or not the jurors might have some feelings for the Federal Government. I think several indicate Civil Service, certain others I don't know whether they work for the Federal Government or not. Although I think Chief Justice Hughes back in the '30s held government employees could serve, I feel I am entitled to explore whether or not they have had government service.

I have asked, "Have you ever been a victim of a crime?", which the Court didn't ask. This was very critical, I think, in the last jury the Court just had where one of the voir dire questions elicited the fact that a person on the panel had been robbed in another county by illegal aliens. If the juror has been the victim, it is pertinent that I know that.

Further, I feel I am entitled to know whether [158] jurors have prior jury experience, whether federal or state court. I feel that is an avenue of inquiry not revealed. Also, the Court was kind enough to ask about the presumption of innocence, but the concomitant part of the question that they understand the Government's burden to prove evidence beyond a reasonable doubt, I think, is also essential in trying to allay any fear of them understanding that the defense has to prove nothing.

I think the question as to whether or not any of the jurors speaks Spanish is pertinent. The Court swore the interpreter, and I think it is reasonable to assume that

there will be Spanish translation throughout the proceeding and it would be important to the defense if any of them does speak Spanish. I feel although the Court might rule that, certainly I wouldn't want to exclude people who might speak Spanish, I am entitled to that question.

Also, I felt that the question concerning any comment against the defendant who might not testify, I think that should be explored upfront. The Supreme Court recently held the Court had discretion as to whether or not to give an instruction dealing with the fact a defendant failed to testify. In that case, the Court held that—

THE COURT: That's in final instructions.

MR. CLEARY: That's right. I am asking if this jury might feel so, that I can properly probe that area. I feel that this is just the miniscule—

[159] THE COURT: I felt I have made your record. I will stop right there. Well—I will stop right there. Do you have anything?

MS. TAKAHASHI: No, your Honor.

THE COURT: You will have to have six and sixteen peremptories. Is it going to satisfy your alternates?

(Off the record discussion between the Court and the Clerk.)

THE COURT: All right. They have all heard the questions I will have them identify themselves after you call them.

(The following proceedings had in open Court in the presence and hearing of the jury:)

THE CLERK: Ladies and gentlemen, I will call three more names. As I call them, would you be seated in the first three seats directly behind the lady in the brown curduroy coat, please?

No. 21, William Hooks;

No. 23, Frances Kaddah;

No. 3, Robert Bordelon.

THE COURT: Beginning with Mr. Hooks, Mr. Hooks, would you rise, identify yourself and give us the answer to those other questions we asked of the jurors, as to your

occupation, how long you have been in San Diego County; if you are retired, what your previous occupation was.

JUROR HOOKS: William Hooks; retired; I have been in [160] San Diego 35 years; I was in the airline business 28 years.

JUROR KADDAH: My name is Frances Kaddah; I live in Brawley in the Imperial Valley; I have lived there about two years; I am a housewife is all; and I have been a school teacher in the past; my husband is a soil consultant.

JUROR BORDELON: I am an NC programmer with an aerospace company; I have lived here 38 years; my wife is a homemaker.

THE COURT: Would counsel then exercise their strikes?

(Counsel exercise their strikes using the Arizona system, after which the following proceedings are had, to-wit:)

THE CLERK: Ladies and gentlemen, as I call your name, the gentleman here in the tan suit will seat you in the box in the proper seat.

No. 1, Marcia Lemmon;
No. 2, Loraine P. Howell;
No. 3, Dennis C. Frye;
No. 4, Geneva Glenn;
No. 5, Doniphan Frazee;
No. 6, Dorothy C. Stark;
No. 7, Isamu Akamatsu;
No. 8, Marcella Harder;
No. 9 Eileen Kennedy;
No. 10, John Workman;
[161] No. 11, Katherine A. May;
No. 12, John J. Kleeb; and
Kathern Muller and Gladys Ritchie, alternates.

Your Honor, the panel and the alternates have been seated.

THE COURT: Would you swear the jury?

THE CLERK: Yes, your Honor. Would you all stand and raise your right hands?

(Jury sworn.)

(Remaining jurors excused.)

THE COURT: Ladies and gentlemen, before we begin the trial, we will take a short recess. Let me first give you one or two admonitions that will carry throughout the whole trial.

No. 1, during the course of the trial, don't discuss the case with anyone and don't let anyone try to discuss the case with you. And that means as well that you shouldn't discuss the case among yourselves until the case is finally submitted to you for your final verdict. If anyone does accost you or try to talk about the case, report it to the Court immediately, and we will take whatever steps are necessary.

We have had some problems lately about smoking in the jury room. I am leaving that entirely to the discretion of the jurors as to how you work out your problems, but [162] there is a small room there for witnesses, and you may use that if you wish, and isolate the smokers from the non-smokers. You handle your own problem on that.

I think that's it for the moment. We will take a ten-minute recess.

* * * * *

[Testimony of Virginia Bowling.]

[360] Q. You referred to him as "Chuy," is that a nickname?

A. Yes, I guess.

Q. Do you know what his true name is?

A. Jesus something. I don't know his real last name.

Q. How do you know him?

A. I worked with Chuy.

Q. Did he ever live in your home at 1120 Fern Street, Imperial Beach?

A. Yes, he did.

Q. And how did that come to be?

A. He was dating my daughter.

Q. And when did he start living at your house?

A. About the 1st of July.

Q. July of 1978?

A. Right.

[361] Q. Did he ever contribute to the rent, utilities or food during the time he lived there?

A. Not actually, no.

Q. Could you explain that?

A. He didn't have his own money; no.

Q. Does he speak any English that you know?

A. Yes.

Q. Do you speak any Spanish?

A. No, I don't.

* * * * *

[366] Q. Now this yellow Charger with a license plate of DR-551, whose car is that?

A. That's my daughter's, Kim.

Q. Was that ever used in alien smuggling activities?

A. Yes, it was.

* * * * *

[368] Q. After you crossed the San Clemente checkpoint,—by the way, why would you be driving the car containing aliens through the San Clemente checkpoint?

A. Why would I?

Q. Yes.

A. For money, and because I was American, I could make it.

Q. Could you explain that just a little bit more?

A. They don't check American people, and I would always have somebody with me, as much as they do Mexican people.

* * * * *

[370] Q. Then do you know what would happen after that?

A. As far as I know, the guides take them through the hills and down to the car waiting.

Q. Now, how would a car that is waiting get there?

A. Chuy. He would drive up and I would follow him and bring him back home or Kim would follow him and then he would wait to see if they make it.

* * * * *

[377] Q. Did you tell him who Chuy was?

A. I told him Chuy was Kim's boyfriend.

Q. Was it her boyfriend or husband, do you recall?

A. He is her boyfriend.

Q. Do you remember what you told Investigator Sanders?

A. Well, the way the young kids are today, I never know whether they are husbands or what they are. I'm sorry.

* * * * *

[381] Q. Does your daughter use the phone regularly?

A. My daughter doesn't even live with me, my older daughter.

Q. Oh, I see, your younger daughter?

A. Right.

Q. How many children do you have?

A. Three.

Q. Who are they?

A. Deborah, Patrick and Kim.

Q. How old is Deborah?

A. 28. Patrick is 25 and Kim is 19.

Q. And of those adult children, which live with you?

A. Kim.

Q. And how long has she lived with you?

A. 19-½ years.

* * * * *

[382] A. I don't recognize the phone numbers, but Kim used to call Chuy all the time in L.A. They used to check on each other.

Q. And when did Kim meet Chuy?

A. In January.

Q. Of 1978?

A. Right.

Q. And how long had she gone with him before he moved in with you?

A. He didn't move in until about the 1st of July.

Q. Now, they were pretty close at that time; is that a fair statement?

A. Very close at one time.

Q. Are they close now?

A. Well, he's here, and she's there.

Q. By that you mean?

A. He has telephoned her quite often from MCC to my [383] house, yes.

Q. Now, do you have anybody else there at that house besides yourself and Kim at the present time?

A. I sure do, my granddaughter.

Q. Do you have anyone else?

A. No.

Q. Now, who is Javier?

A. The man I work for.

Q. You are a United States citizen; is that correct?

A. I'm American.

Q. You are a United States citizen also?

A. I was borned here, yes.

* * * * *

[397] Q. And what were the circumstances of how your daughter met?

A. My daughter met?

Q. Yes. How your daughter, Kim, met Humberto.

A. You want me to tell you her lovelife?

Q. No.

A. Because that's the way it will have to happen.

Q. No. How did they meet? Did he come to your place or did she go up?

A. She met him at Javier's house.

* * * * *

[407] Q. How long has your daughter lived with you?

A. 19-½ years. I think I told you that.

Q. All that time she has remained with you, she hasn't left home at any time?

A. No.

Q. And Chuy moved in and lived with her commencing the first of July, 1978; is that correct?

A. Right.

Q. And was he on good terms with her up until the time of his arrest?

A. They said they were in love. I don't know.

Q. And during that time that you knew Chuy from the first of January on, and then when the —approximately five months he stayed with you at your house as your daughter's consort, you never knew his full name?

A. I've heard two different names, but now I don't know what his name is.

As far as I am concerned, Chuy is a nice person. He has always treated me nice and he has always been a nice person. I'm sorry I can't say anything bad about him.

[408] Q. What you are saying is not bad about him?

A. I'm not saying—I'm guilty, too. We are guilty. We are guilty.

Q. Chuy used you. Is that a fair statement?

A. No. Chuy didn't use me and I didn't use Chuy. Nobody used nobody. We worked together.

Q. When Chuy was there with you, didn't you or your daughter provide him with food or other subsistence with which to live at your house?

A. Whatever was there in the house, he was welcome to it, as so many of my kid's friends were.

Q. In other words, he was living off your largess; is that correct?

A. I never considered people—if I had something to give—living off me, because I never considered that living off me.

Q. My point is, generally you were kind enough to support him while he stayed with you?

A. I didn't consider myself supporting him. He stayed with Kim. They were together. They were going to get a place eventually. I never considered him living off me. I don't know why they say that.

Q. To your knowledge, did he own any automobiles?

A. The silver Torino and part of the van.

Q. But he didn't have his name on the pink slip?

[409] A. Neither do I.

Q. But who had the money?

A. Both of us.

Q. Who paid the rent?

A. I did.

Q. Do you have a bank account?

A. No, I don't. I wish I did.

* * * * *

[410] Q. Now, when you told the agents you didn't know who Humberto Rosales-Lopez was—you did that because—

A. I absolutely did not know who he was. I did not know. I didn't know who they were talking about. They can tell you that themselves. I looked very stupid, I guess, but I did not know who they were talking about. The green cards are all fake anyway. You never know who's who.

Q. Has your daughter ever run any illegal aliens?

A. Kim?

Q. Yes.

A. You will have to ask her about that.

Q. Do you know?

A. I don't know a great deal about my daughter. My daughter is a "junkie." She is a heroin user, and I have been fighting for four years with her. I don't know a great deal she does except try to help her.

United States District Court

FOR THE
SOUTHERN DISTRICT OF CALIFORNIA

No. 78-0863-Criminal

UNITED STATES OF AMERICA

v.

HUMBERTO ROSALES-LOPEZ (1)

JUDGMENT AND COMMITMENT—Entered Apr. 3, 1979

On this 2nd day of April, 1979 came the attorney for the government and the defendant appeared in person and[1] by counsel, John Cleary, of Federal Defenders.

IT IS ADJUDGED that the defendant upon his plea of[2] not guilty and a verdict of guilty has been convicted of the offense of conspiracy to conceal, habor and shield, and illegally transport aliens in violation of 18 USC 371 and 8 USC 1324 as charged in count 1; aiding and abetting the illegal transportation of aliens in violation of 8 USC 1324(a)(2) and 18 USC 2 as charged in each of counts 2, 3 and 4; and concealing, harboring and shielding aliens in violation of 8 USC 1324(a)(3) as charged in each of counts 5, 6 and 7 of the indictment in 7 counts and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that on counts 1 through 7 the defendant is guilty as charged and convicted.

IT IS ADJUDGED that on count 1 the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of eighteen (18) months.

IT IS ADJUDGED that on each of counts 2 through 7, to run consecutive to each other and consecutive to count 1

the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years. Execution of sentence as to counts 2 through 7 only is suspended and the defendant is placed on probation for a period of five (5) years on condition that he obey all laws, federal, state and municipal, that he comply with all lawful rules and regulations of the probation department, that he not be found in the company of anyone who is not legally entitled to be in the United States, that he not have any false documents in his possession, that he not enter the United States without proper documents and that if he enters the United States, he report to the probation office.

IT IS ORDERED that probation supervision is waived if the defendant is deported and while he remains in Mexico.

IT IS FURTHER ORDERED that the underlying indictment in this case is hereby dismissed.

/s/ _____

GORDON THOMPSON JR.
United States District Judge
Filed: April 2, 1979

WILLIAM W. LUDDY
Clerk

/s/ _____

By: V. C. MOHLER,
Deputy

United States Court of Appeals,
Ninth Circuit.

No. 79-1302.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

HUMBERTO ROSALES-LOPEZ, DEFENDANT-APPELLANT.

OPINION—March 20, 1980.

Rehearing Denied May 12, 1980.

John J. Cleary, Federal Defender, San Diego, Cal., for defendant-appellant.

Irene Takahashi, Asst. U.S. Atty. (on the brief), Michael H. Walsh, U.S. Atty., Irene Takahashi, Asst. U.S. Atty. (argued), San Diego, Cal., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of California The Honorable Howard F. Corcoran, Presiding.

Before WALLACE and ANDERSON, *Circuit Judges*, and PALMIERI,* *District Judge*.

J. BLAINE ANDERSON, *Circuit Judge:*

Defendant Humberto Rosales-Lopez appeals his conviction below for one count of conspiracy to conceal, harbor and shield, and illegally transport aliens in violation of 18 U.S.C. § 371 and 8 U.S.C. § 1324, three counts of aiding and abetting the illegal transportation of aliens in violation of 8 U.S.C. § 1324(a)(2) and 18 U.S.C. § 2, and three counts of concealing, harboring and shielding aliens in violation of 8 U.S.C. § 1324(a)(3). Rosales-Lopez was sentenced to serve five years for each count, with each sentence to run consecutively, but the sentences for each of the last six counts were suspended. We affirm on all issues.

*The Honorable EDMUND L. PALMIERI, Senior United States District Judge, Southern District of New York, sitting by designation.

I. *BACKGROUND*

Rosales-Lopez, a resident alien, was involved in an illegal alien smuggling operation in Southern California. Briefly stated, the object of the plan was to transport aliens who had surreptitiously crossed the Mexican-American border from a point in Imperial Beach, California, by automobile up Interstate Five to a drop point in Los Angeles. Rosales-Lopez' conviction in December 1978, arises from his arrest for the transportation of three Mexican aliens from Imperial Beach to Los Angeles.

The three aliens, led by a guide whose identity remains unknown, left Tijuana on foot and crossed the border under cover of darkness. The guide took them to a car parked on the American side of the border, and drove them to the residence of Virginia Hendricks Bowling in Imperial Beach. Bowling, an American citizen, lived at the Imperial Beach residence with her daughter. Sometime in July 1978, Rosales-Lopez had become romantically involved with Bowling's daughter and had moved into the Imperial Beach residence. When the three aliens whose entry is at issue here arrived early on the morning of December 11, Rosales-Lopez admitted them, along with the guide, into the garage of the Bowling house.

The method of transporting the aliens apparently conformed to a plan which had been followed on previous occasions. The guide and the aliens entered the trunk of a green Oldsmobile, and Rosales-Lopez closed the lid of the trunk. Bowling then entered the Oldsmobile and drove it north on Interstate Five through the San Clemente checkpoint, with Rosales-Lopez following in a grey Ford. Once both automobiles had cleared the checkpoint, they pulled off into a parking lot and Bowling exchanged cars with Rosales-Lopez. The guide emerged from the trunk of the Oldsmobile and proceeded to drive to Los Angeles, with Rosales-Lopez seated on the passenger side. The purpose of Bowling driving the car through the checkpoint was to deter suspicion by avoiding the use of a Latin-appearing driver. Bowling returned to Imperial Beach in the Ford, following the exchange of cars.

The Oldsmobile was driven to an apartment in Los Angeles, where the aliens were let out of the trunk and told by Rosales-Lopez to go upstairs into the apartment. The apartment was apparently occupied by a number of other illegal aliens who had been transported to the location by other means. Sometime after the arrival of Rosales-Lopez, the guide, and the three aliens, the other named principals in the smuggling arrangement, David Falcon-Zavala and Joe Manuel Flores, arrived at the apartment, apparently under orders from a person higher up in the smuggler's chain of command. Falcon-Zavala and Flores were to be involved in the transportation of the numerous aliens present at the apartment to specific locations in Southern California which were the aliens' ultimate destinations.

Agents of the Immigration and Naturalization Service had been maintaining surveillance over both the Los Angeles apartment and the Imperial Beach residence for a number of weeks prior to December 11. In fact, agents had followed the progress of the green Oldsmobile from Imperial Beach to Los Angeles that morning. Agents had observed Rosales-Lopez open the trunk of the Oldsmobile at Los Angeles, and had also observed the aliens leave the trunk and proceed up the stairs. In addition, automobile traffic around the apartment had been heavy. The agents concluded that the apartment was being used as a drop site for illegal aliens.

At approximately noon on December 11, Flores departed in an automobile with two of the aliens. Agents stopped the Flores car a few blocks away and obtained admissions from the aliens that they were present in the United States illegally. A short time later, Rosales-Lopez, Falcon-Zavala, and one of the aliens who had been transported in the trunk of the Oldsmobile left the apartment in another automobile. Agents approached the car while it was stopped at a gas station. All three occupants were arrested. A short time later, agents raided the apartment, and all of the aliens present were taken into custody.

Rosales-Lopez, Flores, Falcon-Zavala, and Bowling were originally indicted on sixteen counts of conspiracy,

harboring and shielding aliens, aiding and abetting, and illegal transportation of aliens. Falcon-Zavala and Bowling each plead guilty to misdemeanors. Flores became a fugitive whose whereabouts apparently remain unknown. A superseding indictment filed February 9, 1979, charged Rosales-Lopez and Flores with seven counts of conspiracy, concealing and harboring, illegal transportation, and aiding and abetting. Rosales-Lopez was convicted and sentenced on each count. Procedural details will be developed as necessary in the opinion.

II. *ISSUES ON APPEAL*

Rosales-Lopez raises seven issues on appeal:

(1) Whether the district judge's voir dire of the jury venire was adequate to detect potential bias or prejudice;

(2) Whether the trial court erred in refusing to provide Rosales-Lopez, an indigent, with a free copy of the transcript of a suppression hearing;

(3) Whether sentencing was improperly imposed by a district judge who did not preside at trial;

(4) Whether the district court erred by denying Rosales-Lopez an evidentiary hearing on possible prosecutiorial vindictiveness;

(5) Whether the district court erred in refusing to give an instruction on a lesser-included offense;

(6) Whether consecutive sentences were improperly imposed;

(7) Whether the exemption from prosecution for employers contained in 8 U.S.C. § 1324 denies Rosales-Lopez equal protection of the laws.

III. *VOIR DIRE*

Pursuant to the "Arizona Plan" utilized in the Southern District of California, the trial judge conducted the voir dire of the jury venire. Counsel for Rosales-Lopez submitted several requested questions to the court prior to voir dire, a number of which the judge declined to ask.

Rosales-Lopez claims reversible error in the court's failure to make six specific inquiries.

We affirm as to five of the six with only brief comment.[1] The scope of voir dire is a matter within the sound discretion of the trial judge, and will not be disturbed on appeal unless the procedures used or questions propounded are so unreasonable as to constitute an abuse of discretion. *United States v. Baldwin*, 607 F.2d 1295 (9th Cir. 1979). After reviewing the entire voir dire procedure, we cannot say that the questions propounded were insufficient to probe for bias. We find no error generally in the refusal to ask five of the six questions.

Rosales-Lopez also requested that the court inquire whether his Mexican descent would affect the jurors' deliberations.[2] While we also affirm on this question, we feel that a more extended discussion is in order. A longstanding rule of criminal justice in the federal courts holds that questions regarding possible racial prejudice should be put to the venire in prosecutions of minority defendants, at least where "special circumstances" indicate that the defendant's race may be a factor in the trial. *See Ristaino v. Ross*, 424 U.S. 589, 96 Ct. 1017, 47 L.Ed.2d 258 (1976); *Aldridge v. United States*, 283 U.S. 308, 51 S.Ct. 470, 75 L.Ed. 1054 (1931). The extent of the federal rule is unclear. Some circuits have applied what amounts to a *per se*

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[1] The five requested questions were phrased as follows:

"6. Have you ever employed or have had friends that have employed illegal aliens?"

"13. Have you ever worked for the federal Government? If so, as what? How long?"

"16. Have you ever been a victim of a crime?

"18. Have you ever sat as a juror in a civil or criminal case? What was the nature of the case and the verdict?"

"23. Are you able to speak Spanish? If so, how well? Would you be willing to accept the interpreter's translation?"

[2] The question as submitted read:

"7. Would you consider the race or Mexican descent of Humberto Rosales-Lopez in your evaluation of this case? How would it affect you?

rule that a racial prejudice question must be put to the venire in all cases where the defendant is a member of a minority group. See, *e.g.*, *United States v. Bowles*, 574 F.2d 970 (8th Cir. 1978); *United States v. Bell*, 573 F.2d 1040 (8th Cir. 1978); *United States v. Robinson*, 485 F.2d 1157 (3d Cir. 1973). Our circuit, however, has declined to impose such a voir dire requirement upon district courts absent some indication that prejudice is likely to arise, or that the trial will have racial overtones. *See United States v. Perez-Martinez*, 525 F.2d 365 (9th Cir. 1975); *United States v. Walker*, 491 F.2d 236 (9th Cir.), *cert. denied*, 416 U.S. 990, 94 S.Ct. 2399, 40 L.Ed.2d 768 (1974).

Under the principle of stare decisis, we are constrained to follow our holding in *Perez-Martinez*, *supra*, unless a subsequent decision of this court or of the United States Supreme Court has altered its basic principle. The Supreme Court addressed the question after our decision in *Perez Martinez* in *Ristaino v. Ross*, *supra*, a state prosecution of a black defendant charged with an assault upon a white security guard. In determining that there is no constitutional compulsion upon state courts to inquire into racial prejudice on voir dire, the Court noted that the duty imposed upon federal courts under the Court's supervisory power is much broader:

> "Although we hold that voir dire questioning directed to racial prejudice was not constitutionally required, the wiser course generally is to identify racial prejudice if required by the defendant. Under our supervisory power we would have required as much of a federal court faced with the circumstances here."

424 U.S. at 597 n.9, 96 S.Ct. at 1022 n.9.

We do not find that *Ristaino's* cryptic reference to the federal rule requires that we disregard *Perez-Martinez*. While the Court found that there was not a "significant likelihood that racial prejudice might infect Ross' trial," 424 U.S. at 598, 96 S.Ct. at 1022, we note that the facts of *Ristaino* presented a greater likelihood of prejudice than do the facts of the present case. At least one other circuit has arrived at a similar conclusion in its interpretation of *Ristaino*. See *United States v. Polk*, 550 F.2d 1265 (10th

Cir.), *cert. denied*, 434 U.S. 838, 98 S.Ct. 129, 54 L.Ed.2d 100 (1977). Accordingly, we hold that the Mexican heritage of Rosales-Lopez did not, in and of itself, require the court below to pose a question on racial prejudice to the venire.

We also find no circumstances in the record indicating that racial prejudice was likely to arise at trial. Perhaps the greatest potential for prejudice arose from the charge of harboring and transporting illegal aliens in a locality where the problem of illegal alien entry is a particularly sensitive issue. The trial judge, however, inquired into the feelings of the jurors on the illegal alien problem, and two jurors were excused on that basis. We find that the voir dire in this case adequately probed the venire for potential bias on all issues.

IV. *TRANSCRIPT OF SUPPRESSION HEARING*

In the course of his pre-trial motions, Rosales-Lopez moved to suppress certain evidence, and Judge Thompson conducted an evidentiary hearing on February 5, 1979. At the close of the hearing, counsel for Rosales-Lopez moved to obtain a copy of the hearing transcript at government expense on the ground that his client was indigent. Judge Thompson denied the motion to provide the transcript and, though the record here is ambigious,[3] apparently re-

[3]The following exchange took place between defense counsel and Judge Thompson at the close of the hearing:

> "Mr. Cleary: The reason I mentioned that was there is some indication, and I didn't raise those points here, concerning certain aspects of conduct, and at least the stated intention of the government to seek reindictment in this because of some of the defects in my pleadings. The one thing I would like to preserve at this time is a motion at this time for a transcript of these proceedings so that in the event of trial, which is now anticipated, I would have the opportunity for effective cross-examiantion—I only have my seven pages of notes—which is in *Britt v. North Carolina*, the requirement of keeping adequate notes to effectively cross-examine and confront what I assume will be two adverse witnesses at the time of trial.
>
> "The Court: Those matters and matters of discovery, I'm not going to order any transcript relative to this hearing at all.

ferred the matter to the magistrate. On February 13, Magistrate Infante granted the motion to produce the transcript and signed a standard CJA Form 21 voucher. On February 21, however, Judge Thompson issued a memorandum denying defense counsel's request for the transcript, citing the failure to demonstrate any "particularized need" for it. Judge Corcoran, to whom the case was assigned for trial, refused to overrule Judge Thompson on the transcript question.

Rosales-Lopez asserts that the allegedly irregular method of reviewing the magistrate's ruling requires reversal, and raises both constitutional and statutory issues on the denial of the transcript. Because we find that the denial of the transcript was harmless beyond a reasonable doubt, we find it unnecessary to address the procedural question raised by Rosales-Lopez.

While we are convinced that Rosales-Lopez was not prejudiced by the government's failure to provide him with a transcript, we feel some comments on the issue of providing trial aids to indigents are in order. The duty of the government to provide an indigent criminal defendant with the essential tools of trial defense is of both a constitutional and statutory dimension. *See generally Britt v. North Carolina*, 404 U.S. 226, 92 S.Ct. 431, 30 L.Ed.2d 400 (1971); 18 U.S.C. § 3006A. Under certain circumstances, a transcript of a prior proceeding related to a criminal prosecution may be an item which the government is required to furnish to the indigent. *See Britt v. North Carolina, supra; Roberts v. LaVallee*, 389 U.S. 40, 88 S.Ct. 194, 19 L.Ed.2d 41 (1967). Where a mistrial has occurred, courts have generally regarded a transcript of the prior trial as a tool "reasonably necessary" to an effective defense and have deemed it error to refuse to provide

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"Mr. Cleary: Could I ask that rather than dismissing my motions that my motions be transferred to the magistrate?

"The Court: No. It's improperly brought in this court according to local rules, so it would be dismissed without prejudice, which means you can bring it again." R.T. 92-93.

the defendant with such a transcript, provided that a timely request is made for its production. *See, e.g., United States v. Johnson*, 584 F.2d 148 (6th Cir. 1978), *cert. denied sub nom., Monger v. United States*, 440 U.S. 918, 99 S.Ct. 1239, 59 L.Ed.2d 469 (1979); *United States v. Jonas*, 540 F.2d 566 (7th Cir. 1976); *United States v. Baker*, 523 F.2d 741 (5th Cir. 1975); *United States v. Acosta*, 495 F.2d 60 (10th Cir. 1974); *United States v. Young*, 472 F.2d 628 (6th Cir. 1972); *United States ex rel. Wilson v. McMann*, 408 F.2d 896 (2d Cir. 1969); *Peterson v. United States*, 351 F.2d 606 (9th Cir. 1965); *But see United States v. Brown*, 443 F.2d 659, 143 U.S.App.D.C. 244 (D.C.Cir. 1970); *Forsberg v. United States*, 351 F.2d 242 (9th Cir. 1965).

Where, however, the indigent defendant requests a transcript of a preliminary proceeding, courts have been less willing to find error in the failure to so provide. In *Roberts v. LaVallee, supra*, the Supreme Court struck down per curiam on equal protection grounds a New York statute which required all criminal defendants to pay five cents for every hundred words of requested transcripts of preliminary proceedings. The Court, however, did not address the limits of the indigent's right to a free transcript in such cases. Circuit courts considering the issue have generally shown a greater inclination to examine the actual prejudice to the defendant resulting from the denial of a transcript of a preliminary hearing than has been shown in cases involving the denial of a trial transcript. In *United States ex rel. Moore v. People of the State of Illinois*, 577 F.2d 411 (7th Cir. 1978), *cert. denied*, 440 U.S. 919, 99 S.Ct. 1242, 59 L.Ed.2d 471 (1979), the court found error in the failure to provide a transcript of a preliminary hearing at which an allegedly suggestive confrontation took place between the defendant and a rape victim, but held the error to be harmless beyond a reasonable doubt. In *United States ex rel. Cadogan v. La Vallee*, 428 F.2d 165 (2d Cir. 1970), *cert. denied*, 401 U.S. 914, 91 S.Ct. 887, 27 L.Ed.2d 813 (1971), failure to provide a transcript of a suppression hearing was held to be not prejudicial

where alleged discrepancies between testimony given at the hearing and at trial were "trival."

While the standard of reasonable nececessity in the area of free transcripts remains imprecise, the court below applied a standard which we find to be incorrect. The Supreme Court in *Britt v. North Carolina*, *supra*, ruled out "particularized need" as the applicable test for necessity. *See* 404 U.S. at 228, 92 S.Ct. at 434. We find, however, that the application of an erroneous legal standard in this case was harmless beyond a reasonable doubt. Rosales-Lopez claims prejudice in that two Immigration Service agents gave testimony at the suppression hearing which would have been useful in impeaching their testimony at trial. The defense, however, can point to only two minor inconsistencies between the testimony at the suppression hearing and the testimony given at trial.[4] Given the overall strong consistency between the lengthy testimony given by the witness at the hearing and the trial, we find beyond a reasonable doubt that the lack of a copy of the suppression hearing transcript did not prejudice the ability of the defense to cross-examine effectively and thereby present an adequate defense at trial.

V. *SENTENCING PROCEDURE*

Rosales-Lopez claims that he was improperly sentenced by Judge Thompson, who had not presided at trial. Judge Corcoran, a visiting judge who sat in the district by desig-

[4] At the suppression hearing, Investigator Sanders testified that after the Oldsmobile arrived at the Los Angeles address, he made the following observation: ". . . I saw three people get out of the trunk of the Oldsmobile and go up the stairs to the second story apartment, with Humberto Rosales and the unknown Latin behind him." (R.T. 42) At trial, Investigator Sanders testified that Rosales-Lopez and the unknown male "hurried" the aliens up the stairs." (R.T. 196).

A second alleged inconsistency arose where, at the suppression hearing, Investigator Sanders described the driver of the Oldsmobile as ". . . a male Latin, with short, black hair. I believe he was wearing sunglasses, probably about 25 to 30 years old, maybe." (R.T. 73) At trial, Sanders described the driver as having "some kind of glasses," and described his age as "around 30." (R.T. 212).

nation, had presided at the trial but had returned to his home district prior to sentencing.

Fed.R.Crim.Proc. 25(b) allows for a district judge who did not preside at trial to pass sentence where the presiding judge is unable to do so by reason of "absence, death, sickness or other disability." The procedure under Rule 25(b) is proper where the sentencing judge is familiar with the case, and uses informed discretion in passing sentence. *United States v. Ortiz*, 603 F.2d 76, 81 (9th Cir. 1979), *cert. denied*, ___ U.S. ___, 100 S.Ct. 678, 62 L.Ed.2d 652 (1980). In this case, Judge Thompson had presided over certain pre-trial matters, and had studied the presentencing report. The sentence itself reflects an informed discretion since the consecutive sentences on six of the counts were suspended. The passing of sentence by Judge Thompson was not error.

VI. *PROSECUTORIAL VINDICTIVENESS*

Rosales-Lopez moved for dismissal below on the ground of vindictive prosecution, and for an evidentiary hearing relating to the dismissal motion. The court denied both motions.

The basis of the dismissal motion was that other members of the alien smuggling ring were allowed to plead to lesser misdemeanor counts and placed on probation. Rosales-Lopez maintains that his prosecution on felony counts was in response to his insistence on a jury trial, and that he was thereby "penalized" for exercising a constitutional right.

A defendant's right to due process of law is violated where the prosecution increases the severity of alleged charges in response to the exercise of a constitutional or statutory right. *See generally Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974); *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); *United States v. Ruesga-Martinez*, 534 F.2d 1367 (9th Cir. 1976). Vindictiveness is normally found where the government has occasion to re-indict or re-try a defendant following the exercise of a procedural

right. *See United States v. Ruesga-Martinez, supra,* at 1369. Our circuit has refused to find the action of the prosecutor in reindicting a defendant vindictive where the charges contained in the second indictment expose the defendant to no greater risk of punishment than did those contained in the first indictment. *See United States v. Snell,* 592 F.2d 1083 (9th Cir.), *cert. denied,* 442 U.S.___, 99 S.Ct. 2889, 61 L.Ed.2d 315 (1979).

In the present case, Rosales-Lopez has not faced any increased risk of punishment in response to the exercise of his rights. If anything, his risk of punishment was lessened by the superseding indictment, which dropped a number of the original counts. The court below did not err in refusing to dismiss on the basis of Vindictive prosecution.

VII. *INSTRUCTION ON LESSER INCLUDED OFFENSE*

Rosales-Lopez requested, but did not receive, an instruction on the lesser-included offense of aiding and abetting the illegal entry of an alien under 8 U.S.C. § 1325 and 18 U.S.C. § 2. He argues that 8 U.S.C. § 1324(a)(1) contains an element of knowledge that the alien entered the United States within the past three years, which is in addition to the elements of aiding and abetting entry under § 1325.

We cannot agree that § 1325 is properly chargeable as a lesser included offense. An element of the charge of aiding and abetting any offense under 18 U.S.C. § 2 is guilty knowledge. In this regard, we cannot find that § 1324 imposes an additional element in the government's burden of proof. *Cf. United States v. Wishart,* 582 F.2d 236 (2d Cir.), *cert. denied,* 439 U.S. 987, 99 S.Ct. 582, 58 L.Ed.2d 660 (1978); *United States v. Madden,* 525 F.2d 972 (5th Cir. 1976).

VIII. *CONSECUTIVE SENTENCES*

Rosales-Lopez contends that the imposition of consecutive sentences for conviction on counts of conspiracy, aid-

ing and abetting the illegal transportation of aliens, and concealing, harboring and shielding illegal aliens constitutes an unreasonably pyramiding of punishment in contravention of the intent of Congress in enacting the statutory scheme dealing with illegal aliens.

The imposition of consecutive sentences on separate counts is improper where the separate offenses encompass successive steps or grades which normally flow into the same criminal act. *United States v. Hernandez-Miranda*, 601 F.2d 1104, 1109 (9th Cir. 1979). An example of an instance where separate offenses flow into the same criminal act is an indictment for illegal entry by alien, 8 U.S.C. § 1325, and illegal re-entry of a deported alien, 8 U.S.C. § 1326, where the alien is charged with violating both statutes by a single act of entry. *United States v. Ortiz-Martinez*, 557 F.2d 214 (9th Cir. 1977).

The offenses with which Rosales-Lopez was charged do not constitute a single criminal act. The evidence adduced at trial revealed that Rosales-Lopez had engaged in some advance planning with other members of the smuggling ring, had sheltered the aliens at the Bowling residence, and had been clearly involved in the transportation of the aliens from Imperail Beach to Los Angeles. While it may not be unusual for these acts to occur in close relation to each other, each constitutes a separate danger to the public interest in preventing the entry of illegal aliens, and it is reasonable to find that Congress intended for each to be punished separately. No error was committed in the imposition of consecutive sentences.

IX. *EQUAL PROTECTION*

8 U.S.C. § 1324 contains a specific exemption proclaiming that employment of aliens shall not constitute "harboring." Rosales-Lopez claims that this exemption violates equal protection, and that his prosecution under the section was, therefore, illegal. Contrary to the assertion of defense counsel, we adequately disposed of this argument in *United States v. Acosta de Evans*, 531 F.2d 428 (9th Cir.), *cert. denied*, 429 U.S. 836, 97 S.Ct. 103, 50 L.Ed.2d

101 (1976). That decision is controlling. Rosales-Lopez was not denied equal protection of the laws.

X. *CONCLUSION*

The judgment of the court below, and the imposition of sentences are

AFFIRMED.

Supreme Court of the United States

No. 79-6624

HUMBERTO ROSALES-LOPEZ, PETITIONER,

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE United States Court of Appeals for the Ninth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question 1 presented by the petition.

October 6, 1980

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